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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 433

ALICE HOWE, AS EXECUTRIX OF THE ESTATE OF MARY E. B.
HOWE, DECEASED,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT AND BRIEF IN SUPPORT OF PETITION.**

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*To the Honorable Harlan F. Stone, Chief Justice of the
United States and the Associate Justices of the Supreme
Court of the United States:*

Your petitioner respectfully shows:

Summary Statement of the Matter Involved.

This petition is directed to a judgment of the Circuit Court of Appeals for the Seventh Circuit reversing the District Court and holding that the liquidation trust before the court involved gifts of future interests so that the gift tax exclusions contended for by petitioner would not be allowable, under the rule laid down in *U. S. v. Pelzer*, 312 U. S. 399.

The trust in question was created by Mary E. B. Howe for the benefit of her seven named children. Later, in 1937, she transferred additional property to the trust and in her gift tax return claimed seven exclusions of \$5,000 each (R. 2 and 3). The Commissioner disallowed six of the seven exclusions. The donor accordingly paid under protest \$2,768. This suit was brought to recover that sum, plus \$147.50 interest.

The terms of the trust (R. 5-11), state that its general purpose is (R. 5)

“to conserve the assets while present circumstances render it difficult or impracticable to distribute them and to place the assets as rapidly as practicable in condition for liquidation and distribution.”

As to the time and manner of distribution of trust income and corpus the trust instrument provides (R. 8-9):

10. The Trustees shall, from time to time, distribute among the Beneficiaries such accumulated income as may in their judgment not be needed as a reserve for taxes and other obligations.

13. All distributions of liquid assets or cash, whether income or principal, shall be in equal shares between the Beneficiaries except that in case of the death of a Beneficiary, the share shall go to the heirs, legatees or devisees of such Beneficiary. * * *

The provision largely relied upon by opposing counsel as authorizing accumulation reads as follows (R. 6, 7):

4. Before binding the trust in any building program or other similar enterprise that may reasonably be expected to involve a total expenditure of over Three Thousand Dollars (\$3,000.00), the Trustee shall give to each of the Beneficiaries ten (10) days' notice in writing of the nature of the proposal and in case a majority of the beneficiaries express in writing their disapproval within said ten (10) days, the Trustees shall not proceed therewith. * * *

As to final distribution, the instrument says (R. 8) :

12. Upon a majority of the Beneficiaries or of the survivors of them joining in a written demand that the estate be closed and distributed, the Trustee shall comply with said demand within one year from the presentation thereof to the Trustees, but in any event such closing shall not be later than eighteen years after the death of the Donor.

Attached to the trust instrument and incorporated by reference is a printed excerpt from a Chicago Title & Trust Company form in common use embodying a conveniently broad statement of trustee powers.

Judgment was entered for the taxpayer in the sum of \$2,915.58 plus interest (R. 37, 38).

The Circuit Court of Appeals reversed, its opinion being reported in 142 Fed. 2d 310. The Court (R. 58) quotes at length from the printed form just referred to, and later (R. 58) seems to attach importance to these printed "broad powers" as controlling the typed instrument. The opinion (R. 56) gave lip service to the statement in *Comr. v. Glos*, 123 Fed. 2d 548, 550, that the distinction between present and future gifts depends on whether there is a postponement of rights "which would be forthwith existent if the interest were present," but asserted that the critical question was whether the donees acquired an interest capable of present and "immediate" enjoyment.

Passing over the liquidation purpose, the court addressed itself (R. 57) to the "form" of the gift, particularly to the 18 year (maximum) duration, and imputed to us reliance on Par. 12 "to meet this long trust duration". It rejects our supposed argument and says that "it follows" that the gift is a future interest.

The opinion adopts (R. 58) a broad construction of the trustee powers under Par. 4, but does not reconcile this with the directions in Par. 10 to distribute income.

In conclusion, the court states (R. 59) that "the trustees' discretion * * * has all the legal earmarks of authority to accumulate income." The District Court is reversed.

Jurisdictional Statement.

This Petition is presented under Sec. 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (U. S. Code, Title 28, Sec. 347a). The judgment sought to be reversed was entered April 25, 1944 and the petition for rehearing was denied June 6, 1944.

Questions Presented.

1. Under the *Pelzer* case (312 U. S. 399) it is a proper statement of the rule to say that a gift must be "immediate" in order to be present?
2. Does a majority-vote power of the beneficiaries to prevent accumulation preclude an accumulation argument?
3. Does the fact that a liquidation purpose operates in opposite direction from accumulation, control trust powers that might otherwise be doubtful?
4. Can postponement inherent in the nature or condition of the assets be relied on for pronouncing a gift "future"?
5. Did Congress intend that gifts in trust might be pronounced "future" when the trust instrument creates no difficulty in valuing?

Reasons Relied On for Allowance of the Writ.

1. The Circuit Court of Appeals decision that a gift must be "immediate" in order to qualify for the exclusion is in conflict with all of the decisions in which gifts in trust have been held to be present, since in none of those cases was the gift "immediate".

Commissioner v. Brandegee (C. C. A. 1), 123 Fed. 2d 58.

Charles v. Hassett (D. C., Mass.), 43 Fed. Supp. 432.

Other cases are cited and summarized in C. C. H. Gift Tax Service, Secs. 3965.361 to .368 inclusive.

2. The holding that the gifts involve accumulation despite provisions for majority control involves misconstruction of and misapplication of *Ryerson v. U. S.*, 312 U. S. 405.

3. The Court's insistence that it must "look at the form" instead of construing the instrument in the light of the liquidation purpose is in conflict with the decisions in which the purpose has controlled close questions of construction. *Smith v. Comr.* (C. C. A. 8), 131 Fed. 2d 254.

4. In relying on obstacles to enjoyment inherent in the non-liquid condition of the assets the court fails to apply the rule that it purports to adopt from *Commr. v. Glos*, 123 Fed. 2d 548, 550, which rule limits future interests to those in which the postponement relates to interests "which would be forthwith existent" except for the postponement in the trust.

5. Since no element of contingency is involved and such postponement as is apparent in the trust is in fact inherent in the nature of the assets, the trust does not create a difficulty of valuing such as Congress had in mind in adopting the future interests wording.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, commanding that court to certify and send to this Court a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Seventh Judicial Circuit be reversed, that the judgment of the District Court be affirmed and that petitioner be granted such other and further relief as may seem proper.

HERBERT BEBB,

Attorney for Petitioner.

